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NO. 83-751

**IN THE**

# Supreme Court of the United States

OCTOBER TERM, 1983

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SECURITIES AND EXCHANGE COMMISSION, et al.,
Petitioners

v.

JERRY T. O'BRIEN, INC., et al.
Respondents

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BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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## QUESTION PRESENTED

Whether a target of a Securities and Exchange Commission investigation should be given notice of an administrative subpoena issued to a third party.

## PARTIES TO THE PROCEEDING

Respondent Jerry T. O'Brien, Inc., is a securities broker-dealer with offices in Wallace, Kellogg, and Coeur d'Alene, Idaho, and Spokane, Washington. Its principal shareholder and chief officer is respondent Jerry T. O'Brien. (Hereafter these respondents shall be referred to as "respondents O'Brien".)

Respondent Benjamin A. Harrison is sole shareholder of respondent Pennaluna & Company, Inc., a private investment company of Mr. Harrison. Prior to June, 1970, Pennaluna & Company, Inc., was a securities broker-dealer; it now licenses its name to respondents O'Brien. Mr. Harrison is an employee of Jerry T. O'Brien, Inc., and is also secretary of the Spokane Stock Exchange, a national securities exchange. (Hereafter these respondents shall be referred to as "respondents Harrison".)

Co-respondent H. F. Magnuson & Company is the accountant for Jerry T. O'Brien, Inc., and for Pennaluna & Company, Inc. Co-respondent H. F. Magnuson is also a customer of Jerry T. O'Brien, Inc. (Hereafter these respondents shall be referred to as "respondents Magnuson".)

Respondents Jerry T. O'Brien, Inc., and Pennaluna & Company, Inc., have no parent, subsidiary, or affiliate corporations.

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## I. STATEMENT

Respondents are targets of an SEC investigation.[1/] Respondents filed this lawsuit in September, 1981. Respondents claimed that the SEC and its agents

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1/ The subject matter of any investigation is some person's conduct. A person whose conduct is under investigation is commonly called a "target" of the investigation. See, for example, U.S. v. Baggot, ___ U.S. ___, 77 L. Ed. 2d 785 (1983). With respect to a particular target, a third-party is any other person or entity.

were conducting the investigation in excess of statutory authority.[1/] Respondents continue to assert these claims. Respondents sought to enjoin SEC conduct, and also sought to restrain

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[1/] Respondents alleged the following: (1) SEC agents had obtained documents from respondents O'Brien by misleading respondents and their attorneys as to their status as targets. See SEC v. ESM Government Securities, Inc., 645 F.2d 310 (5th Cir. 1981); (2) SEC agents were acting beyond the authority granted to them by the Commission in formal order of investigation (FOI) S-1555 by investigating respondents O'Brien, and by investigating alleged violations of additional provisions not specified in the FOI.

> "Subpoenas are enforceable only to the extent that they seek information which is reasonably relevant to matters within the scope of the formal order of investigation. Should the staff uncover information indicating the advisability of pursuing possible violations not embodied within the scope of the formal order, it must return to the Commission and seek an amendment to the order." H. R. Rep. No. 1321, 96th Cong. 2d Sess. 2 (1980) reprinted (1980) U.S. Code Cong. & Admin. News, 3877 n.2.

co-respondents Magnuson from complying with SEC subpoenas issued to them. Co-respondents voluntarily declined compliance, and cross-claimed against the SEC. On January 20, 1982, the district court declined equitable relief. The district court held that, because there existed outstanding SEC subpoenas to respondent

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1/ (Continued):
See SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 130 (3d Cir. 1981); (3) SEC agents had intentionally made disclosure of the non-public FOI to news media for illegitimate purposes and in violation of SEC regulation and the Privacy Act. See 5 U.S.C. 552a; SEC Reg. §§ 203.5 and 203.7(a), 17 C.F.R. §§ 203.5 and 203.7(a); Silver King Mines, Inc. v. Cohen, 261 F. Supp. 666 (D.C. Utah 1966); Shasta Minerals & Chemical Co. v. SEC, 328 F.2d 285 (10th Cir. 1964); (4) SEC agents had surreptitiously obtained access to private documents of respondent Harrison in bad faith and in violation of his right to privacy; (5) SEC agents had issued subpoenas to respondents and co-respondents which were without legitimate purpose, unspecific in purpose, overbroad, improperly issued, and requesting information already in the SEC's possession.

Pennaluna & Company, Inc., and to co-respondents Magnuson, an SEC action to enforce these subpoenas under Section 22(b) of the Securities Act, 15 U.S.C. 77v(b), and Section 21(c) of the Exchange Act, 15 U.S.C. 78u(c), provided to respondents an adequate remedy at law.

Thereafter, the SEC brought no subpoena-enforcement action against respondents or co-respondents. However, as the district court itself found, the SEC "waged an aggressive investigation, issuing numerous subpoenas" to third parties. (Dist. Ct. Order, March 25, 1982, Petition, p. 10a.) Respondents alleged in district court, and the SEC did not deny, that the SEC was issuing third-party subpoenas which were unknown to respondents and beyond the scope of their awareness. Respondents requested the district court to order the SEC to provide respondents with notice of third

party subpoenas. Without notice, respondents would have no opportunity to question the SEC's exercise of authority, and thus no adequate remedy at law. On March 25, 1982, the district court declined to order notice. But in doing so the court stated:

> "I cannot say with certainty that this heretofore unresolved question could not be determined otherwise on appeal." Dist. Ct. Order, March 25, 1982, Petition, p. 15a.)

Respondents timely appealed to the Court of Appeals for the Ninth Circuit. The Court of Appeals reversed the district court and held that the SEC must give respondents notice of third-party subpoenas.[1/]

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[1/] Throughout the proceedings in district court, the SEC had not initiated a subpoena-enforcement action on any outstanding subpoenas. On April 1, 1982, the SEC finally commenced an action against respondent Pennaluna & Company, Inc., co-respondents, and certain third parties. The action was filed in the Western District of Washington, although

II

REASONS FOR DENYING PETITION

Summary of Argument

The decision of the Court of Appeals is based upon statute and upon this Court's decisions in United States v. Powell, 379 U.S. 48 (1964), and Reisman v. Caplin, 375 U.S. 440 (1964). The Court of Appeals' decision is consistent with the reasoning of other decisions of this Court, including the recent decision in United States v. Sells Engineering, Inc., __ U.S. ___, 77 L. Ed. 2d 743 (1983). The Court of Appeals' decision disposes of an issue of first impression, which has not been considered by any other court of appeals. The Court of

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1/ (Continued): the defendants and the documents subpoenaed were in the Eastern District or in Idaho. The Western District changed venue to the Eastern District of Washington. The action is currently pending. SEC v. Magnuson, No. C82-362V (W.D. Wash.), No. C82-282 (E.D. Wash.).

Appeals' decision merely makes effective the statutory process of Sections 19(b), 20(a), and 22(b) of the Securities Act of 1933, 15 U.S.C. 77s(b), 77t(a), and 77v(b), and Sections 21(a)-(c) of the Exchange Act of 1934, 15 U.S.C. 78u(a)-(c).

The Court of Appeals' decision creates no new rights or remedies. The decision is merely an elaboration of existing law. Under statute, the SEC can make investigations and issue agency subpoenas only within the scope of its authority. Under statute, a person who receives an agency subpoena need not comply until the SEC, in a subpoena-enforcement action, shows the court that it is conducting its investigation within its authority. Under existing decision, if the target of an SEC investigation is aware of a subpoena to a third party, then the target may petition the court to

enjoin compliance and may petition the court to intervene in the enforcement action. Under existing law, the Court, in its discretion, may or may not grant such petitions; but, in either event, the target has opportunity to question the lawfulness of SEC conduct. Therefore, under existing law, the target who has notice of a third-party subpoena has an adequate, statutory remedy at law for SEC action in excess of authority. The Court of Appeals' decision merely makes explicit that notice is necessary to implement an existing statutory remedy.

The Court of Appeals' decision does not threaten to seriously impede SEC investigations. The decision does not limit the SEC's investigatory discretion. The decision does not involve the courts in SEC determinations concerning who, what, why, when, and where to investigate. The decision does not

involve the courts in supervising SEC investigations, except to the extent that Congress has provided in express statute. The Court of Appeals' decision does not impose on the SEC any new legal duty beyond compliance with existing law. The Court of Appeals' decision only reinforces a statutory check and balance designed to insure the legitimacy of, and public confidence in, SEC action.

A. The Court of Appeals' Decision Is Based upon Statute and Decisions of this Court.

Congress has given the SEC "limited authority" to undertake investigations. Sells Engineering, supra, 77 L. Ed. 2d 758. The SEC must exercise its authority in compliance with the statutory standards granting investigatory authority. Powell, supra.[4/]

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[4/] An agency has a "duty" to act within the scope of its statutory authority. A citizen has a corresponding

Congress has given the SEC the authority to issue agency subpoenas in the course of exercising its investigative authority. However, Congress has withheld from the SEC the authority to enforce its subpoenas. Congress has required that the SEC must bring on a subpoena-enforcement action before the district court.[5/] Section 22(b) of the

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[4/] (Continued): "right" to be subjected only to agency action which is within its statutory authority. Congress intends such right to be enforced. The courts have jurisdiction to protect citizens from "agency action taken in excess of delegated powers", and may fashion an adequate remedy. Leedom v. Kyne, 358 U.S. 184, 190 (1958); 28 U.S.C. § 1337.

[5/] Congress has left enforcement of an agency subpoena or summons to the discretion of the court. Oklahoma Press, 327 U.S. at 217 n.57. The court's role is "neither minor nor ministerial". Id. As Justice Frankfurter once stated:

> "The power of Congress to impose on courts the duty of enforcing obedience to an administrative subpoena was sustained precisely because courts were not to be automata

Securities Act and Section 21(c) of the Exchange Act. Although an SEC investigation may be nonadjudicatory, in contrast, a subpoena-enforcement action is an adversary proceeding involving the SEC, parties subpoenaed, and, upon intervention, those parties "affected by disclosure".[6/] Reisman, supra, 375 U.S. 445-46; Powell, supra; Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

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5/ (Continued): carrying out the wishes of the administrative. They were discharging judicial power with all the implications of the judicial function in our constitutional scheme." Penfield Co. of California v. SEC, 330 U.S. 585, 604 (1947) (dissenting opinion).

6/ A target is an "affected" party. Reisman, supra. Intervention is permissive, and will be allowed or denied upon the "usual process of balancing the equities." Donaldson v. U.S., 400 U.S. 517, 530 (1971). Consistent with Powell standards, a target will be allowed to intervene if the material is sought for an "improper purpose". Donaldson, supra, 400 U.S. 589.

An SEC investigative subpoena must be issued only as authorized by law. Oklahoma Press, supra. Courts will not enforce an agency subpoena unless the SEC meets its burden of showing that it is exercising investigatory power within statutory limits. As this Court stated in Powell:

> "Reading the statutes as we do . . . [the agency] must show [1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within the [agency's] possession, and [4] that the administrative steps required by the Code have been followed. . . ." (Emphasis added.) 379 U.S. 57-58.

If, and only if, the court determines that the SEC has made such showing, then the burden shifts to the opposing party to challenge "on any appropriate ground". Reisman, supra, 375 U.S. 449.[1/]

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[1/] Like the IRS statute in Powell, Congress clearly intended that each SEC investigation initiated by the SEC would

Congress has accomplished two purposes by requiring the SEC to initiate a subpoena-enforcement action. First, Congress has engaged the courts to give "judicial supervision" to the SEC's exercise of its investigatory authority and to thus check and balance possible abuse.

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1/ (Continued) have some "subject matter" of inquiry. The 1933 Act contemplates each investigation would inquire into "facts and circumstances concerning the subject matter". 15 U.S.C. § 77t(a). The 1934 Act contemplates each investigation would inquire into "facts, conditions, practices, or matters". § 78u(a). Congress also intended that each investigation have a "purpose", and it specifically authorized the SEC to issue subpoenas only for "the purpose of any such investigation". § 78u(b). See also § 77t(b) (1933 Act). Congress specifically provided that subpoenaed testimony or documents be "relevant or material to the inquiry" of such investigation. § 77t(b) (1933 Act); § 78u(b) (1934 Act). Congress further provided that upon the SEC's petition for enforcement, the "court may issue an order requiring" production of documents or testimony "touching the matter under investigation or in question". § 78u(c) (1934 Act).

Oklahoma Press, supra, 327 U.S. at 217.[8] Second, Congress has provided an adversary forum in which persons affected by SEC subpoenas may question the lawfulness of SEC investigatory action.[9]

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[8] The agency is authorized to investigate, "but the Act makes [its] right to do so subject in all cases to judicial supervision. Persons from whom [it] seeks relevant information are not required to submit to [its] demand, if in any respect [it] is unreasonable or over-[illegible] the authority Congress has [illegible]. To it, they may make 'appropriate defense' surrounded by every safeguard of judicial restraint." Oklahoma Press, supra, 327 U.S. 216-17 (footnotes and citations omitted).

[9] An SEC subpoena is coercive. But its coercive force results only from the court's ability to enforce it. When the SEC issues a subpoena, it therefore invokes the process of the court. In issuing a subpoena, the SEC announces, in effect, "if you do not comply, we will take you to court". The SEC thus announces that it can meet the Powell requirements. An SEC subpoena which is issued in violation of the Powell requirements is thus an abuse of the court's process. The "Court may not permit its process to be abused". Powell, supra, 379 U.S. 58.

In the course of an investigation, the SEC issues subpoenas to targets and to third-party witnesses. If a target "is aware of the issuance of the [third-party subpoena] prior to compliance", then that target has opportunity to question the SEC's exercise of authority in issuing the subpoena. United States v. Genser, 582 F.2d 292, 300-01 (3d Cir. 1978); Reisman, supra. The target can contact the third party and request noncompliance, or the target may petition the court to "restrain compliance . . . until compliance is ordered" in a subpoena-enforcement action. Reisman, supra, 375 U.S. 449-50. The target may, as a party affected by disclosure, seek to intervene in any enforcement action and ask the court to assure SEC compliance with the statutory standards of Powell. Because a target has the foregoing opportunities to put the SEC to

its proof of showing legitimacy, the statutory subpoena-enforcement action constitutes an adequate remedy at law, preventing SEC abuse of investigatory authority.[10/]

However, if the target is not aware of the issuance of third-party subpoenas, then the subpoena-enforcement action is not an adequate remedy at law. The Congressionally-mandated forum for scrutinizing the SEC's exercise of investigatory authority is effectively bypassed. Through lack of motive or ignorance of

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[10/] As to each subpoena, the SEC must meet Powell requirements. An agency subpoena to one party may meet the test; but a subpoena to a second party may fail. See U.S. v. Theodore, 479 F.2d 749 (4th Cir. 1973), in which the court found that an IRS summons to a third-party accountant of the target taxpayer was "too broad and too vague to be enforced". See also U.S. v. Harrington, 388 F.2d 520 (2d Cir. 1968), in which the court ordered enforcement of an IRS summons to a third party but only after finding the IRS summons was relevant and not over broad.

their rights, most non-target third parties will not resist compliance with agency subpoenas.[11/] As this Court has noted:

> "True, there can be no penalty incurred for contempt before there is a judicial order of enforcement. But the subpoena is in form an official command, and even though

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[11/] A subpoena is issued because compulsion is necessary to coerce information a person will not voluntarily give. A target has an obvious interest in whether or not the agency investigation is lawful. If the agency has no legitimate purpose for investigating the target, or seeks information not relevant to that purpose, or otherwise acts unlawfully, then the target should not be subjected to the investigation and its adverse effects. However, a non-target third party does not share these same interests. A third party suffers only the inconvenience of producing documents or giving testimony as requested and no other adverse effects. Common sense tells us that the third party does not have the conviction of principle or other motivation required to undertake the costs of litigation inherent in litigating with the government. Additionally, because of the coercive form of the agency subpoena, a third party may not know that the agency subpoena is not enforceable unless first ordered by a court.

> "improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command, or their natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation." Cudahy Packing Co. v. Holland, 315 U.S. 357, 363-64 (1942), quoted in U.S. v. Menker, 350 U.S. 179, 187 (1956).

The government is frank to admit that it seeks to avoid subpoena-enforcement actions required by Section 21(c) of the Exchange Act.[12/] The government argues that notice will result in an increase in the number of subpoena-enforcement actions and that this will turn SEC investigations into trial-like proceedings. As the Court of Appeals noted, subpoena-enforcement actions are summary proceedings and have priority on court

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12/ The government argues that a notice requirement constitutes the court's imposition of procedural rules on the executive branch in violation of FCC v. Schreiber, 381 U.S. 279 (1965). However, as stated in SEC v. Csapo, 533 F.2d 7 (D.C. Cir. 1976):

calendars. The SEC's burden of showing the Powell requirements is not difficult, and in most cases may be done by affidavit. Once the showing is made, the subpoena is enforced unless a party affirmatively shows the SEC's conduct is unreasonable. Such "burden is not easily met". SEC v. Brigadoon Scotch Distributing Co., 480 F.2d 1047, 1056 (2d Cir. 1973).

The government raises a "parade of horribles" listing the ways targets with

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12/ (Continued)
"Nor do we find anything to the contrary in FCC v. Schreiber . . ., heavily relied on by the Commission. Although the Court there counseled judicial restraint in interfering with the broad procedural powers delegated by Congress to the federal agencies, it nevertheless reaffirmed the responsibility of the courts to insure that administrative action is consistent with governing statutes and constitutional requirements." 533 F.2d at 11 (citations omitted). See also SEC v. Higashi, 359 F.2d 550 (9th Cir. 1966).

notice could obstruct agency investigations; however, "such speculation is insufficient". SEC v. Csapo, 533 F.2d 7, 11 (D.C. Cir. 1976). See also Sells Engineering, supra. By requiring notice, the Court of Appeals has done no more than ensure the effectiveness of Sections 19(b), 20(a), and 22(b) of the Securities Act and Section 21 of the Exchange Act. If notice is not given to targets, then the SEC effectively avoids the Congressionally-mandated checks and balances for prevention of agency abuse.[11/]

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[11/] The government argues that notice is not required because the target may assert a claim of abuse of process in any subsequent trial. The government cites Donaldson, supra, which, in turn, cites U.S. v. Blue, 384 U.S. 251 (1966). Blue is a criminal case. An SEC investigation may result in criminal or civil prosecution. While there may be the remedy of suppression of evidence for SEC abuse of authority in a criminal action, there clearly is no such remedy in a civil action. This Court has never

B. The Court of Appeals' Decision Is Not Contrary to Other Decisions.

The government argues that the Ninth Circuit decision conflicts with In Re Application of Cole, 237 F. Supp. 274 (S.D.N.Y. 1964), rev'd, 342 F.2d 5 (2d Cir. 1965), cert. denied, 381 U.S. 950 (1965) and Scarafiotti v. Shea, 456 F.2d 1052 (10th Cir. 1972). However, both cases are clearly distinguishable.[14/]

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13/ (Continued) held that evidence obtained by the government, even in violation of the Constitution, may be suppressed or excluded in civil proceedings. See U.S. v. Janis, 428 U.S. 433 (1976). Respondents are aware of no cases in which evidence obtained by abuse of process has, in fact, been suppressed.

14/ The Court of Appeals' decision is not based upon consitutional provisions. It distinguishes decisions holding that there is no constitutional right to notice of third-party subpoenas. U.S. v. Schutterle, 586 F.2d 1201 (8th Cir. 1978) (due process), is thus inapplicable. Likewise, the prior Ninth Circuit decisions in Kelley v. United States, 536 F.2d 897 (1976) (Fourth and Fifth Amendments), and Howfield, Inc. v. United States, 409 F.2d 694 (1969) (unconstitutionality), are inapplicable.

In Cole, the taxpayer target sought notice of an IRS summons to a known third party, the taxpayer's bank. Because the third party was known, the target was able to force the IRS to initiate a subpoena-enforcement action, and the Second Circuit was in a position to determine that the target had no standing to intervene.[11] Unsurprisingly, the Second Circuit found that the target, "at least in the factual situation presented by this case", did not need notice of a known third-party summons. 342 F.2d 7. The Second Circuit specifically declined "to discuss" whether or not this Court's Reisman decision inferred a notice requirement. 342 F.2d 7. Additionally, because the target did not question the

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[11] This Court's decision in Donaldson, supra, cited In Re Cole, supra, for the proposition that intervention in a subpoena-enforcement action is permissive and not a matter of right.

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been met by the SEC. Unlike Cole, respondents have not had opportunity to question the SEC's showing of lawfulness of the third-party subpoena. Unlike the Second and Tenth Circuits, which did not decide the issue, the Ninth Circuit specifically determined that a target party is entitled to notice of third-party subpoenas.[11/]

C. Agency Investigations Are Not Grand Jury Investigations.

The government argues that, because no statute expressly provides for notice

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[11/] The SEC points to the recent decision of the Southern District of New York in PepsiCo, Inc. v. SEC, 563 F. Supp. 828 (S.D.N.Y. 1983). Unlike the case at hand, plaintiff in that case had apparently received a subpoena and was not challenging the subpoena or the purposes of the investigation. The district court denied a temporary restraining order, citing U.S. v.Miller, 425 U.S. 435 (1976), and Hannah v. Larche, supra, which the Ninth Circuit in its decision distinguished, as well as Application of Cole, supra. The district court invited a prompt appeal to the Second Circuit.

of agency subpoenas, Congress did not intend such notice to be given. The government argues that Congress intended that SEC investigations proceed, like grand jury investigations, under a cloak of secrecy. The government ignores the basic proposition that in our system of free and open government, secrecy is the rare exception, and notice is the rule. The grand jury is allowed to operate in secret only because of institutional checks and balances, and only under express provision for secrecy in Rule 6(e) of the Federal Rules of Criminal Procedure.

The government's argument is inconsistent with the reasoning of this Court in the Sells Engineering decision. Although Congress has granted the SEC the authority to make investigations, Congress has clearly not granted the SEC

the "extraordinary powers" of the grand jury; Congress has granted to the SEC "usual, more limited avenues of investigation". Sells Engineering, supra, 77 L. Ed. 2d 752, 757-58.

Although Congress has granted the SEC authority to investigate, such grant does not imply the authority to operate in secret. This Court has properly held that agency investigations, like grand jury investigations, may be initiated without probable cause. Oklahoma Press, supra; Powell, supra. However, beyond this one common element, any analogy between the grand jury and the SEC fails.

This Court has carefully refrained from suggesting that agency investigations are identical to grand jury investigations. Hannah v. Larche, 363 U.S. 420 (1960); SEC v. ESM Government Securities, Inc., 645 F.2d 310 (5th Cir.

1981)[12/]. The contrasts are irreconcilable:

(1) The grand jury is of constitutional origin. In contrast, the SEC is solely a creature of statute.

(2) The grand jury is a body of private citizens serving for a limited duration. In contrast, the SEC is an ongoing agency of the executive branch.

(3) The grand jury operates "independently" of the prosecutor as a check and balance upon possible prosecutorial abuse. Sells Engineering, supra, 77 L. Ed. 2d 756. In contrast, the SEC operates without this division of function. SEC v. ESM, supra, 645 F.2d 312-13. The only check and balance upon the SEC is the subpoena-enforcement action of Section

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[12/] Hannah v. Larche, supra, cited extensively by the government, involved the Commission on Human Rights. That Commission was a purely investigatory agency and, unlike the SEC, had been granted no prosecutorial function.

22(b) of the Securities Act and Section 21(c) of the Exchange Act.

(4) The grand jury performs the "dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions". Sells Engineering, supra, 77 L. Ed. 2d 752, quoting Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972). In contrast:

> "Although the SEC has a dual function, it is not an historic guardian of individual liberties. Instead, its two functions are investigation of possible illegal activities, and adjudication of alleged violations. . . . The SEC is not, like the grand jury, a protector of individuals against government prosecution. . . . There is no division of functions . . . between police and the grand jury. . . ." SEC v. ESM, 645 F.2d 312-13, citing Hannah v. Larche, 363 U.S. at 446-47.

(5) A grand jury investigation is strictly a criminal proceeding and cannot be utilized to investigate noncriminal violations. Sells Engineering, supra.

In contrast, an SEC investigation may inquire into possible civil or criminal violations, although the SEC has no power itself to bring a criminal action. Common experience indicates that few SEC investigations result in criminal prosecutions.

(6) A grand jury is expressly required to operate in secrecy. CrR 6(e); Sells Engineering, supra; U.S. v. Baggot, ___ U.S. ___, 77 L. Ed. 2d 785 (1983). In contrast, Congress has not expressly provided for SEC secrecy. The secrecy of the grand jury is mandatory. In contrast, the SEC claims discretion to operate either in secrecy or in public.

Secrecy is an investigative tool of the grand jury, not of the prosecutor. This Court has specifically held that the prosecutor will not be allowed "to manipulate the grand jury's powerful investigative tools" to investigate "where no

criminal prosecution seems likely" or to "elicit evidence for use in a civil case". Sells Engineering, supra, 77 L. Ed. 2d 757-58. If the SEC were allowed to make investigations using grand-jury-like secrecy, then the SEC would be more powerful than the grand jury itself. The SEC, operating with different purposes and without the checks and balances of the grand jury, would be allowed the discretion to conduct secret investigations into civil matters. If the government's argument is accepted, the SEC's powers would be "extraordinary" and, by contrast, the grand jury's would be "limited". The Sells decision, and its predecessors, would be turned upside down.[10/]

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[10/] The government argues that the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3421 (1976), implies that Congress did not intend that agencies give notice to third-party subpoenas.

This Court has recognized that agency investigations are as much analogous to civil discovery as to grand jury proceedings:

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19/ (Continued) The government argues that because Congress has required notice in limited cases under that Act (namely, notice to customers of a third-party financial institution), Congress did not intend notice in all cases. This argument fails. The legislative history of the Act expressly indicates that it "incorporates and preserves existing legal requirements as prerequisites to the Commission's use of its subpoena authority", and particularly the requirement that subpoenas be "issued in conformity" with statutory standards. H.R. Rep. No. 1321, 96th Cong. 2d Sess. 2 (1980), reprinted (1980) U. S. Code Cong. & Admin. News, 3878. In addition to notice, Congress has required that notice be accompanied by a form of motion, motion paper and sworn statement, and detailed instructions on how to challenge the agency subpoena in court. 12 U.S.C. § 3405. Congress has further provided the remedies of civil penalties, actual and punitive damages, and attorney fees if the Act is violated. Id. § 3417. The Act thus implies that Congress intended that, with respect to financial records, citizens were entitled to remedies in addition to mere notice of a third-party subpoena. The legislative history also indicates that the SEC's need for third-party financial records is "unique" among non-bank regulatory agencies. H.R. Rep. No. 1321, supra, 3876.

> "[An agency's] investigative function in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury's, or the courts in issuing other pretrial orders for the discovery of evidence, and is governed by the same limitations." Oklahoma Press, supra, 327 U.S. 216 (footnotes omitted).

This Court in Oklahoma Press specifically referred to the Federal Rules of Civil Procedure. Oklahoma Press, supra, 327 U.S. 216 n.55.

Analogy to civil discovery would not limit the SEC's ability to initiate investigations without "probable cause", nor limit the scope of the investigation. CR 26(b) of the Federal Rules of Civil Procedure; Oklahoma Press, supra. However, the SEC would be required to issue agency subpoenas accompanied by prior reasonable notice to target parties, unless special circumstances would necessitate a protective order. CR 16, 26(c), and 45. Any abuse by

target parties would be cause for sanctions by the court. CR 30(d), 37, and 45. As Professor Bloomenthal has stated:

> "In an effort to rationalize its position, the Commission [SEC] has expressed concern that premature disclosure 'might allow prospective witnesses . . . to fabricate stories to correspond with testimony that has already been given by others'. It is submitted that such a position disregards laws pertaining to perjury and suborning perjury; is an affront to all members of the bar and disregards now longstanding experience with discovery in the courts.
>
> "It is inevitable that in the course of time that legislation or judicial decision or more enlightened administrative attitude will change the Commission's outmoded stance with respect to discovery. The Commission's position can be explained only by the staff's desire not to be subject to the inconvenience and delay inherent in discovery procedures and by desire to obtain an adversarial advantage."
>
> H. Bloomenthal, Vol. 3, Securities Law Series, Securities and Federal Corporate Law, § 1.12[4] at 1-50.14, quoting James W. Ruddy, Freedom of Information Act, Release No. 34 (Oct. 20, 1975), 8 S.E.C. Doc. 193 (Nov. 5, 1975).

Respondents do not argue that SEC

investigation should be subject to the Federal Rules of Civil Procedure. Respondents recognize that SEC investigations are not strictly analogous to either civil discovery or grand jury proceedings. Because SEC investigations are not adversary proceedings, investigations may proceed without cross-examination and without target-initiated depositions or document production.[11/] Because SEC investigations pursue mere suspicions, they should not be fully public proceedings so that innocent suspects are protected.

However, because SEC investigations are subject to express statute and because subpoena-enforcement actions are adversary proceedings available to both

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[11/] As discussed previously, although SEC investigations are nonadjudicatory proceedings, subpoena-enforcement actions are adversary proceedings.

"parties subpoenaed and those affected by a disclosure", then notice to target parties of third-party subpoenas is essential. Reisman, supra, 375 U.S. at 445.[22/] The Congressionally-mandated subpoena-enforcement action is an adequate check and balance on the SEC's prosecutorial function and an adequate remedy at law if, and only if, the target party receives notice of third-party subpoenas. Notice helps protect the innocent suspect. Notice gives the court opportunity to fulfill its responsibility

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[22/] Respondents recognize that in some cases the SEC may initiate a formal investigation without knowing the identity of all targets. Therefore, there can be no notice requirement until, as the investigation progresses, the target's identity reveals itself to the SEC. Once identified, the target should receive notice. The appropriate analogy exists in the notice requirement of the Federal Rules of Civil Procedure, e.g., notice must be "reasonable". CR 30(b), 31(a), 34(b), and 45.

as "protector of individuals against government prosecution". SEC v. ESM Government Securities, Inc., supra, 645 F.2d at 313.

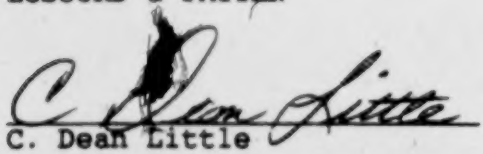
## III

## CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted on December 7, 1983.

LeSOURD & PATTEN



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## ADDENDUM

Courts of appeal of the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Tenth, and District of Columbia Circuits have had occasion to hear appeals dealing with subpoena-enforcement actions. Appellate decisions include the following:

SEC v. Howatt,
525 F.2d 226 (1st Cir. 1975);
U.S. v. Salter,
432 F.2d 697 (1st Cir. 1970);
SEC v. Brigadoon Scotch Distributing Co., 480 F.2d 1047 (2d Cir. 1973); cert. denied, 415 U.S. 915 (1974);
SEC v. Wall Street Transcript Corp., 422 F.2d 1371 (2d Cir. 1970); cert. denied, 398 U.S. 958;
U.S. v. Harrington,
388 F.2d 520 (2d Cir. 1968);
SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118 (3d Cir. 1981);
U.S. v. Genser,
582 F.2d 292 (3d Cir. 1978), cert. denied, 444 U.S. 928;
U.S. v. McCarty,
514 F.2d 368 (3d Cir. 1975);
U.S. v. Theodore, 479 F.2d 749 (4th Cir. 1973);
SEC v. ESM Government Securities, Inc., 645 F.2d 310 (5th Cir. 1981);
U.S. v. Roundtree,
420 F.2d 845 (5th Cir. 1969);

United States v. Wright Motor Co., Inc., 536 F.2d 1090 (5th Cir. 1976);
CAB v. United Airlines, Inc., 542 F.2d 394 (7th Cir. 1976);
U.S. v. National State Bank, 454 F.2d 1249 (7th Cir. 1972);
U.S. v. Matras, 487 F.2d 1271 (8th Cir. 1973);
Lynn v. Biderman, 536 F.2d 820 (9th Cir. 1976) cert. denied, 429 U.S. 920;
Chapman v. Maren Elwood College, 225 F.2d 230 (9th Cir. 1955);
Wild v. U.S., 362 F.2d 206 (9th Cir. 1966);
Shasta Minerals & Chemical Co. v. SEC, 328 F.2d 285 (10th Cir. 1964);
Hellenic Lines, Ltd. v. Federal Marine Board, 295 F.2d 138 (D.C. Cir. 1961);
Montship Lines, Ltd. v. Federal Maritime Board, 295 F.2d 147 (D.C. Cir. 1961);
U.S. v. Fensterwald, 553 F.2d 231 (D.C. Cir. 1977);
See also Silver King Mines, Inc. v. Cohen, 261 F. Supp. 666 (D.C. Utah 1966).

Courts in the First, Second, Third, Fifth, Seventh, Ninth, Tenth, and District of Columbia Circuits have applied decisions involving the IRS, notably Powell, supra, to the SEC and other agencies.

## APPENDIX

Sections 19(b) and 22(b) of the Securities Act of 1933, 15 U.S.C. 77s(b) and 77 v(b), and Sections 21(a)-(c) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(a)-(c) are set forth in Appendix G of the Petition for Writ of Certiorari, pp. 31a-31b.

Section 20(a) of the Securities Act of 1933, 15 U.S.C. 77t(a), provides:

> "Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts."